Supreme Court, U.S.
FILED
031407 APR 6 - 2004
OFFICE OF THE CLERK

No. 03-___

IN THE

Supreme Court of the United States

Richard Gerald Rousey and Betty Jo Rousey,
Petitioners,

v.

Jill R. Jacoway.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas R. Brixey
Claude R. Jones
JONES LAW OFFICE
P.O. Box 1577
Harrison, AR 72602-1577

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

April 6, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Should this Court grant certiorari to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E)?

PARTIES TO THE PROCEEDINGS BELOW

The only parties to this proceeding are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT 2
REASONS FOR GRANTING THE WRIT 5
I. The Courts of Appeals Are Intractably Divided Over the Question Presented. 6
II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented. 12
III. Individual Retirement Accounts Are Eligible for Bankruptcy Exemption Under Section 522(d)(10)(E). 14
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Am. Honda Fin. Corp. v. *Cilek (In re Cilek)*, 115 B.R. 974 (Bankr. W.D. Wis. 1990) 8
In re Bates, 176 B.R. 104 (Bankr. D. Me. 1994) 8
In re Burkette, 279 B.R. 388 (Bankr. D.D.C. 2002) 8
Carmichael v. *Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996) ..... passim
Clark v. *O'Neill (In re Clark)*, 711 F.2d 21 (CA3 1983) . 9, 15
Dettmann v. *Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001) 4, 7, 15
Dionne v. *Harless (In re Harless)*, 187 B.R. 719 (Bankr. N.D. Ala. 1995) 8
Dubroff v. *First Nat'l Bank of Glens Falls*, 119 F.3d 75 (CA2 1997) 5, 7, 8, 15
Farrar v. *McKown (In re McKown)*, 203 F.3d 1188 (CA9 2000) 5, 7, 15
In re Garrison, 108 B.R. 760 (Bankr. N.D. Okla. 1989) 8
In re Gralka, 204 B.R. 184 (Bankr. W.D. Pa. 1997) 10
Huebner v. *Farmers State Bank*, 986 F.2d 1222, 1225 (CA8), *cert. denied*, 510 U.S. 900 (1993) 5, 7
In re Marsella, 188 B.R. 731 (Bankr. D.R.I. 1995) 8
In re Outen, 220 B.R. 26 (Bankr. D.S.C. 1998) 8
In re Scholl, No. 97-32805WS, 1998 Bankr. LEXIS 1059, at *9 (Bankr. E.D. Pa. Aug. 26, 1998) 10
In re Snyder, 206 B.R. 347 (Bankr. M.D. Pa. 1996) 10, 13
In re Suarez, 127 B.R. 73 (Bankr. S.D. Fla. 1991) 8
Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 2
In re Velis, 123 B.R. 497 (D.N.J.), *aff'd in part, rev'd in part*, *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991) 10
Velis v. *Kardanis*, 949 F.2d 78 (CA3 1991) 9
In re Yee, 147 B.R. 624 (Bankr. D. Mass. 1992) 8

Statutes

11 U.S.C. 522 ..... 1, 2, 5, 10
11 U.S.C. 522(b)(1) 7
11 U.S.C. 522(b)(2) 7

11 U.S.C. 522(d) 3
11 U.S.C. 522(d)(1) 3
11 U.S.C. 522(d)(10)(E) ..... passim
11 U.S.C. 522(d)(10)(E)(iii) 15
11 U.S.C. 522(d)(5) 3
11 U.S.C. 541 2
26 U.S.C. 401(a) 2
26 U.S.C. 403(a) 2
26 U.S.C. 403(b) 2
26 U.S.C. 408 ..... 4, 15
26 U.S.C. 408(a) 15
26 U.S.C. 408(a)(6) 16
26 U.S.C. 408(c) 15
26 U.S.C. 4974(c) 16
26 U.S.C. 72(t) 16
26 U.S.C. 72(t)(1) 3, 9
26 U.S.C. 72(t)(2)(A)(i)-(iii) 16
26 U.S.C. 72(t)(2)(B) 16
28 U.S.C. 1254(1) 1

Other Authorities

26 C.F.R. 1.408-8 16
Admin. Office of the U.S. Courts, *News Release: Bankruptcy Filings Up for Calendar Year*, Feb. 25, 2004, *available at* http://www.uscourts.gov/Press_Releases/pr02252004.pdf 12
Andrew M. Campbell, Annotation, *Individual Retirement Accounts as Exempt Property in Bankruptcy*, 133 A.L.R. Fed. 1 (1996) 13
Bankr. Exemption Manual § 5.11 (2003 ed.) 13
H.R. Rep. No. 95-595 (1977) 2, 16
Internal Revenue Serv., *Publication 590 (2003), Individual Retirement Arrangements (IRAs), available at* http://www.irs.gov/publications/p590/index.html 8

Investment Co. Inst., *Fundamentals: Investment Company Institute Research in Brief* (2003), *available at* http://www.ici.org/shareholders/ret/fm-v12n3.pdf 12

PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Gerald Rousey and Betty Jo Rousey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-6a) is published at 347 F.3d 689. The Eighth Circuit's order denying the petition for rehearing and rehearing en banc by a vote of five to four (Pet. App. 36a) is unpublished. The opinion of the Bankruptcy Appellate Panel for the Eighth Circuit (Pet. App. 7a-18a) is published at 283 B.R. 265. The opinion for the Bankruptcy Court for the Western District of Arkansas (Pet. App. 19a-35a) is published at 275 B.R. 307.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2003. A timely petition for rehearing and rehearing en banc was denied on January 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 522 provides, in relevant part:

(d) The following property may be exempted under subsection (b)(1) of this section:

*****

(10) the debtor's right to receive—

*****

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the

support of the debtor and any dependent of the debtor, unless –

> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

STATEMENT

When a debtor files a bankruptcy petition, virtually all of the debtor's property becomes part of the bankruptcy estate, which the bankruptcy trustee will convert to cash and distribute to the debtor's creditors. See 11 U.S.C. 541; *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 641 (1992). A debtor may, however, seek to retain some of his property by claiming an exemption pursuant to 11 U.S.C. 522. See *Taylor*, 503 U.S. at 641. These exemptions "permit an individual debtor to take out of the [bankruptcy] estate that property that is necessary for a fresh start and for the support of himself and his dependents." H.R. Rep. No. 95-595, at 176 (1977).

One such exemption encompasses a debtor's right to receive payments under a "stock bonus, pension, profitsharing, annuity, or similar plan or contract" so long as the receipt of the payments is "reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). The question presented by this case – a question that has given rise to an entrenched three-way split among the courts of appeals – is the extent to which payments from an Individual Retirement Account (IRA) can constitute "exempt property" under this provision. The Eighth Circuit, acknowledging a square circuit conflict, held that seemingly

all IRAs cannot as a matter of law qualify for the exemption provided by Section 522(d)(10)(E).

1. Petitioners Richard and Betty Jo Rousey are a husband and wife who jointly filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Arkansas. Pet. App. 2a. Pursuant to Section 522(d), petitioners sought an exemption for two IRAs having a total value of $55,033.48. *Id.* The IRAs had been funded entirely by the proceeds of Mr. Rousey's pension and Mrs. Rousey's 401(k) plan, which petitioners had accumulated while employed by Northrop Grumman Corporation. *Id.* at 12a. At the termination of their employment, petitioners had simply "rolled over" their pension and 401(k) plans into the IRAs.[1] *Id.*

The trustee did not object to petitioners' exemption of $10,681 of the IRAs' value pursuant to 11 U.S.C. 522(d)(5).[2] Pet. App. 24a. The trustee did, however, file a motion objecting to petitioners' exemption of the remaining $44,352.48 pursuant to 11 U.S.C. 522(d)(10)(E) and requesting turnover of this additional amount. *Id.* at 19a, 24a. The bankruptcy court sustained the trustee's motion, holding that these funds were not exempt because the IRAs were not a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id.* at 34a. It based this holding on the fact that petitioners could withdraw funds (albeit subject to a 10% tax penalty, see 26 U.S.C. 72(t)(1)), before they reached the

---

[1] Petitioner Richard Rousey's IRA contained $42,915.32; petitioner Betty Jo Rousey's IRA contained $12,118.16. Pet. App. 2a.

[2] Section 522(d)(5) provides, in pertinent part, that a debtor can exempt from the bankruptcy estate his "aggregate interest in any property, not to exceed in value $975 plus up to $9,250 of any unused amount of the exemption provided" elsewhere in the subsection for the debtor's residence or a burial plot (see 11 U.S.C. Section 522(d)(1)). The bankruptcy court's ruling under Section 522(d)(5) is not before this Court.

age (59½) at which IRA holders are eligible for payments under federal law. Pet. App. 34a.[3] Furthermore, according to the court, the early-withdrawal possibility meant that payments from petitioners' IRAs would not be made "on account of illness, disability, death, age, or length of service." *Id.* at 35a.

On appeal, the bankruptcy appellate panel affirmed on both grounds. Pet. App. 17a. A concurring opinion, however, urged the Eighth Circuit to revisit its prior precedent holding that IRAs are ineligible to be exempt property. The concurrence emphasized that, although petitioners' retirement funds unquestionably would have been exempt had petitioners filed for bankruptcy while employed by Northrop Grumman, the same funds were no longer exemptible merely because petitioners had to roll them over when they left the company. *Id.* at 18a.

2. The Eighth Circuit affirmed, although only on one of the two grounds invoked by the lower courts. Pet. App. 5a-6a. In contrast to the bankruptcy court and the bankruptcy appellate panel, the court of appeals agreed with petitioners that an IRA is a "similar plan or contract" within the meaning of Section 522(d)(10)(E). *Id.* at 5a. The Eighth Circuit recognized that, like a pension, the funds in petitioners' IRAs were "established over time as part of a long-term retirement strategy" and "serve[d] as a substitute for future earnings." *Id.* The court of appeals noted that four other circuits had found IRAs to satisfy the "similar plan or contract" test and that "dicta from the Supreme Court's opinion in *Patterson* [v. *Shumate*, 504 U.S. 753 (1992)] support this conclusion." Pet. App. 4a-5a (citing *Dettmann* v. *Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar* v. *McKown*, 203 F.3d 1188 (CA9 2000); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996)).

[3] Petitioners' IRAs met the criteria for favorable tax treatment under Section 408 of the Internal Revenue Code. See Pet. App. 26a (noting that the question for the court was how 522(d)(10)(E) "applied to IRAs that qualify for tax-exempt status under § 408").

But based on prior Eighth Circuit precedent construing a nearly identical state exemption statute, the court of appeals held that the IRAs were nonetheless not exempt. Under that precedent, IRAs do not meet the requirement that any payments be made "on account of * * * age." 11 U.S.C. 522(d)(10)(E). "[F]uture payments from the corpus of an Individual Retirement Annuity are not 'on account of age' where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties." Pet. App. 6a (quoting *Huebner* v. *Farmers State Bank*, 986 F.2d 1222, 1225 (CA8), *cert. denied*, 510 U.S. 900 (1993)).

The court of appeals specifically "recognize[d] that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522," but nevertheless deemed itself "constrained" by circuit precedent to reject that contrary view. Pet. App. 6a.

Petitioners timely sought rehearing and rehearing en banc. Their petition was denied by a five-to-four vote, with Judges Bye, Riley, Melloy, and Smith voting to rehear the case en banc. Pet. App. 36a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably divided into three camps over whether and to what extent payments from IRAs can be exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E). Given the large and increasing number of personal bankruptcies and the growing popularity of IRAs, such a conflict is untenable; the question presented affects tens or even hundreds of thousands of individual bankruptcy petitions per year and fundamentally alters the lives of the people who file them. This case presents the ideal vehicle to

resolve the questions raised by the three-way circuit split: first, whether payments from IRAs are exempt; and second, whether such an exemption extends to the corpus out of which future payments will be made as well as to those payments currently being made. Finally, certiorari is also warranted because the Eighth Circuit's decision is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

Under Section 522(d)(10)(E), a debtor is entitled to exempt from the bankruptcy estate the "right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract, on account of illness, disability, death, age, or length of service."[4] Each of the lower courts in this case has recognized that its holding that petitioners' IRAs are not exempt from the bankruptcy estate under Section 522(d)(10)(E) squarely conflicts with the law in four other circuits. See Pet. App. 6a; *id.* at 14a-15a; *id.* at 27a-28a. The Third and Eighth Circuits are the only two circuits in which debtors like petitioners are categorically denied exemptions for their future IRA payments, regardless of need. The rules in these two circuits are different, although both are equally erroneous and both would produce the same result in petitioners' case.

1. The Second, Fifth, Sixth, and Ninth Circuits have interpreted Section 522(d)(10)(E) to permit exemptions for payments from IRAs. See *Dettmann* v. *Brucher (In re*

[4] The amount of the exemption is limited "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." 11 U.S.C. 522(d)(10)(E). Because each of the courts below held that payments from IRAs were not exempt from the bankruptcy estate pursuant to Section 522(d)(10)(E), none addressed whether the amount of the exemption petitioners sought was "reasonably necessary" for their support, and that issue is not before this Court.

Brucher), 243 F.3d 242, 242 (CA6 2001) ("The sole question presented in this appeal is whether an Individual Retirement Account (IRA) can be excluded from a bankruptcy estate * * * pursuant to 11 U.S.C. § 522(d)(10)(E). Following the reasoning of three other courts of appeals, we answer the question 'yes.'"); *Farrar* v. *McKown (In re McKown)*, 203 F.3d 1188, 1190 (CA9 2000) ("We thus hold, like our sister circuits, that an IRA qualifies for exemption under statutory language tracking 11 U.S.C. § 522(d)(10)(E)."); *Dubroff* v. *First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78-80 (CA2 1997) (holding IRAs exempt under a New York state statute "similar in all respects material to our inquiry" to Section 522(d)(10)(E)); *Carmichael* v. *Osherow (In re Carmichael)*, 100 F.3d 375, 376 & n.1 (CA5 1996) (concluding that "IRAs are exempt under [Section 522(d)(10)(E)]" with the possible exception of some unspecified "specially tailored IRAs"). To the best of petitioners' knowledge, every bankruptcy court in the remaining circuits that has addressed the question whether IRAs can be exempt under Section 522(d)(10)(E) or a similar state exemption[5] has joined the majority position in recognizing an exemption for IRAs.[6]

[5] In states like Arkansas that do not opt out of the federal bankruptcy exemption scheme, courts apply 11 U.S.C. 522(d)(10)(E) directly. In states that have chosen to opt out of the federal scheme under 11 U.S.C. 522(b)(1), a debtor may assert exemptions set out in state law and in federal non-bankruptcy laws. See *id.* § 522(b)(2). In these states, the question presented in this case will arise when – as is frequently the case – the state exemption law either incorporates or parallels the federal provision; in such cases, courts have treated the interpretation of such state statutes as being inextricably intertwined with the interpretation of Section 522(d)(10)(E). See, *e.g.*, Pet. App. 6a (following the Eighth Circuit's decision in *Huebner*, 986 F.2d 1222, which interpreted an Iowa statute); *McKown*, 203 F.3d at 1189 (interpreting the California statute by following federal precedent because with respect to the IRA exemption issue, "this California

By contrast, the Eighth Circuit holds that IRAs are categorically excluded from exemption.[7] See Pet. App. 6a.

---

exemption is materially identical to the federal exemption"); *Dubroff*, 119 F.3d at 78 (interpreting the New York statute by following federal precedent because the two statutes were "similar in all respects").

[6] In the First Circuit, see, *e.g.*, *In re Marsella*, 188 B.R. 731, 732 (Bankr. D.R.I. 1995) (adopting majority position on Section 522(d)(10)(E)); *In re Yee*, 147 B.R. 624, 625-26 (Bankr. D. Mass. 1992) (same); and *In re Bates*, 176 B.R. 104, 109 (Bankr. D. Me. 1994) (adopting majority position on Section 522(d)(10)(E) in applying similar state statute). In the Fourth Circuit, see, *e.g.*, *In re Outen*, 220 B.R. 26, 27-31 (Bankr. D.S.C. 1998) (en banc bankruptcy court) (reversing the court's previous adherence to the Third Circuit rule and adopting the majority position for a state statute "nearly identical" to Section 522(d)(10)(E)). In the Seventh Circuit, see, *e.g.*, *Am. Honda Fin. Corp.* v. *Cilek (In re Cilek)*, 115 B.R. 974, 987-89 (Bankr. W.D. Wis. 1990) (adopting majority position on Section 522(d)(10)(E)). In the Tenth Circuit see, *e.g.*, *In re Garrison*, 108 B.R. 760, 768 (Bankr. N.D. Okla. 1989) (explaining that state exemption law which did not cover IRAs could be amended to include IRAs "by enacting a statute somewhat like present 11 U.S.C. § 522(d)(10)(E)"). In the Eleventh Circuit, see, *e.g.*, *In re Suarez*, 127 B.R. 73, 81 (Bankr. S.D. Fla. 1991) (adopting majority position on Section 522(d)(10)(E) and related state statutes); and *Dionne* v. *Harless (In re Harless)*, 187 B.R. 719, 728 (Bankr. N.D. Ala. 1995) (noting that Section 522(d)(10)(E) "exempts payments under IRAs from the bankruptcy process"). In the D.C. Circuit, see *In re Burkette*, 279 B.R. 388, 393 (Bankr. D.D.C. 2002) (adopting the majority position on Section 522(d)(10)(E), without directly addressing whether the tax penalty for early withdrawal of IRAs satisfies the "on account of * * * age" provision).

[7] The Eighth Circuit has suggested that it might apply a different rule to an IRA that included a provision absolutely barring any withdrawal prior to the age-triggered commencement of payments. See Pet. App. 6a. Yet, so far as petitioners have been able to discern, such IRAs do not exist; it appears that *all* IRAs allow early withdrawal subject to a tax penalty. See Internal

The court of appeals concluded that IRAs permitting tax-penalized withdrawal at any time as specified in the Internal Revenue Code, see 26 U.S.C. 72(t)(1), do not dispense payments "on account of illness, disability, death, age, or length of service." Pet. App. 6a.

Finally, the Third Circuit applies yet another rule. That court excludes "future payments" from IRAs from exemption but permits exemptions for "present payments" – that is, payments received by persons who have already reached the statutory age (59½) that entitles them to withdraw funds from their IRAs. Thus, in the Third Circuit, debtors under age 59½ lose their IRAs, while those aged 59½ and older may keep them to the extent reasonably necessary for financial support. See, *e.g.*, *Clark* v. *O'Neill (In re Clark)*, 711 F.2d 21, 23 (CA3 1983); see also *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991) (noting that "as a present entitlement," the debtor's IRA was "susceptible to possible exemption under § 522(d)(10)(E)"). In *Clark*, the court considered whether payments from a different kind of retirement savings plan – a Keogh account – were exempt. That court reasoned that an exemption for "present" but not "future" payments was appropriate because Congress's concern with giving debtors a "fresh start" did not extend to their "long-term security." 711 F.2d at 23. Since then, the Third Circuit's bankruptcy courts

---

Revenue Serv., *Publication 590 (2003), Individual Retirement Arrangements (IRAs)*, ch. 1, *available at* http://www.irs.gov/publications/p590/index.html ("You *can withdraw or use your traditional IRA assets at any time*. However, a 10% additional tax generally applies if you withdraw or use IRA assets before you are age 59½." (emphasis added)). See also *Carmichael*, 100 F.3d at 379 (noting that penalized withdrawal is "statutorily applicable to *any* IRA") (emphasis in original). In any event, even if the Eighth Circuit's assumption that some IRAs do not allow withdrawal is in fact correct, such plans are clearly a rare exception to the rule, and the theory that Congress intended to limit the IRA exemption to this very narrow category finds no support either in the statutory text or in the legislative history. See *infra* at 15-17.

have consistently applied this holding to IRAs, on the ground that the statutory language at issue in *Clark* was virtually indistinguishable. See, *e.g.*, *In re Scholl*, No. 97-32805WS, 1998 Bankr. LEXIS 1059, at *9 (Bankr. E.D. Pa. Aug. 26, 1998) (holding, citing *Clark*, that the "controlling case law in this circuit * * * does not permit an IRA to be exempted * * * when the debtor is not currently receiving income therefrom"); *In re Velis*, 123 B.R. 497, 510 (D.N.J.) (citing *Clark* in applying to both Keogh plans and IRAs the rule that "a § 522(d)(10)(E) exemption is applicable only where a debtor has a present, as opposed to a future, right to receive the pension and retirement benefits at issue"), *aff'd in part, rev'd in part*, *Velis* v. *Kardanis*, 949 F.2d 78 (CA3 1991).

2. This three-way circuit split will not resolve itself without this Court's intervention. The Eighth Circuit has refused to reconsider its adherence to its unique position. Although the panel had acknowledged the circuit split and admitted that the contrary view of the Second, Fifth, Sixth, and Ninth Circuits "may be more consistent with the purposes of § 522," Pet. App. 6a, the Eighth Circuit nevertheless denied rehearing en banc by a five-to-four vote, *id.* at 36a.

The Third Circuit's view is similarly entrenched. That court has held its position for twenty-one years, even in the face of sharp criticism from its own bankruptcy courts. See, *e.g.*, *In re Gralka*, 204 B.R. 184, 189 (Bankr. W.D. Pa. 1997) ("Unfortunately for the debtors, they do not presently possess the right to receive payment from their IRAs * * * pursuant to existing Third Circuit precedent."); *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996) ("While I find that * * * the Debtors have a 'right to payment' in the IRA which falls squarely within the provisions of 11 U.S.C. 522(d)(10)(E), * * * I am stifled in that pursuit by a clear and unambiguous decision of the Third Circuit.").

The Third and Eighth Circuits have become intractable outliers; every other court in the other ten circuits that has

considered the question has taken a contrary position.[8] In each of these jurisdictions, the question whether IRA funds are exempt to the extent reasonably necessary is settled. Because the circuit split is now entrenched, this Court's intervention is required.

3. This case provides an ideal vehicle to resolve the three-way circuit split. Both the distinction drawn by the Eighth Circuit and that drawn by the Third are outcome determinative here. In the Eighth Circuit, whether payments from an IRA are exempt turns on whether the IRA's holder has access to the account prior to reaching the age at which he or she becomes statutorily entitled to payments. Since petitioners' IRAs allow tax-penalized early withdrawal, this distinction was outcome determinative in petitioners' case. In the Third Circuit, the key distinction is between "present" payments – those to which the IRA holder is already entitled by virtue of being over the age of 59½ – and "future" payments; only the former are exempt. Although different from the Eighth Circuit rule, the Third Circuit rule would produce the same result in this case – petitioners, both under age 59½ when the exemption was requested, would lose in either circuit.[9]

Furthermore, there are unlikely to be many cases that proceed through the appellate process and present this Court with a vehicle with which to resolve the question presented. Most debtors, already in financial straits, will lack the means to pursue the issue to this point, including seeking rehearing

---

[8] See *supra* note 6 (listing cases).

[9] Although petitioner Richard Rousey is now 60 years old, petitioner Betty Jo Rousey is now 57 years old. See Petitioners' C.A. App. 54, 66 (listing ages). Thus, even if their *present* ages rather than their ages at the time they filed their bankruptcy petition were dispositive, this Court would still have to pass on the validity of the Third Circuit's rule in order to determine whether Mrs. Rousey's IRA is exempt.

en banc, particularly in the face of well-established circuit precedent.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

The conflict over whether and to what extent IRAs are exempt from bankruptcy estates merits this Court's attention in light of the question's importance. Tens or even hundreds of thousands of people every year are likely affected by the resolution of this issue. In 2003 alone, over 1.1 million Chapter 7 individual bankruptcy petitions were filed in the United States. Admin. Office of the U.S. Courts, *News Release: Bankruptcy Filings Up for Calendar Year*, Feb. 25, 2004, *available at* http://www.uscourts.gov/Press_Releases/pr02252004.pdf. IRAs are increasingly ubiquitous: 33.3% of American households hold a traditional IRA, and 7.5% hold an employer-sponsored IRA. See Investment Co. Inst., *Fundamentals: Investment Company Institute Research in Brief* fig. 1 (2003), *available at* http://www.ici.org/shareholders/ret/fm-v12n3.pdf. As far as petitioners are aware, all of these IRAs allow tax-penalized early withdrawal, see *supra* note 8, and are therefore nonexempt under the Eighth Circuit's rule. Additionally, since the median age of IRA holders is 52 for traditional individual IRAs and 46 for employer-sponsored IRAs, see Investment Co. Inst., *supra*, at fig. 2, the expected payments from most IRAs would be considered "future payments" and thus nonexempt under the Third Circuit rule as well.

Not only does the issue affect a great number of people, but the effect on each individual is substantial. An IRA typically represents an enormous investment in one's future: owners of traditional IRAs have set aside a median amount of $30,000 in their accounts. Investment Co. Inst., *supra*, at fig. 2. Since other forms of retirement savings, like pension plans, are available only through employers, IRAs represent one of the very few methods of retirement savings open to

self-employed individuals or small-business employees.[10] Thus, a person may be left without most or all of his or her retirement savings based on the double misfortune of going through bankruptcy and living in a circuit that interprets the federal statute to deny an exemption for IRAs. In the Eighth Circuit, this serious deprivation will occur as a result of a precedent that the panel decision in this case recognized as likely contrary to the purpose of the statute. See Pet. App. 6a. In the Third Circuit, the deprivation will occur as a result of a precedent with no basis in the text of the statute and so erroneous a rationale that courts in the circuit bemoan it. See, *e.g.*, *In re Snyder*, 206 B.R. 347, 350 (Bankr. M.D. Pa. 1996).

It is not surprising that, in light of the foregoing, "whether an individual retirement account ('IRA') qualifies for the section 522(d)(10)(E) exemption has been frequently litigated." Bankr. Exemption Manual § 5.11 (2003 ed.); see also Andrew M. Campbell, Annotation, *Individual Retirement Accounts as Exempt Property in Bankruptcy*, 133 A.L.R. Fed. 1, § 2(a) (1996) ("[T]here has been considerable litigation concerning the application of § 522(d)(10)(E) and state exemption statutes modeled upon it to IRAs."). The exemptions listed in Section 522(d)(10)(E) are relevant to litigation in the bankruptcy courts in most states,[11] many all

---

[10] In some cases, as here, the IRA funds were formerly part of a pension plan or 401(k). Pension funds are explicitly exempted from the bankruptcy estate by Section 522(d)(10)(E), but when a worker with a pension or 401(k) plan leaves his job, he may (depending on the plan's rules) be required to "roll" the plan's funds into an IRA if he wishes to maintain a retirement savings account. The Eighth Circuit's rule illogically treats those same funds as non-exempt based solely on the fortuity that they are held in one form rather than another.

[11] See *supra* note 5 (explaining that some states use the federal exemptions directly and many others use Section 522(d)(10)(E) indirectly by incorporating or paralleling its language).

of which have published opinions on the issue.[12] The frequency with which the question presented has been litigated is testimony to the great number of people affected and the significance of the effect, and thus the need for this Court to definitively resolve the issue.

Beyond the fact that similarly situated debtors are treated differently across circuits, the longstanding circuit split causes additional unfairness and uncertainty. For example, individuals who, like petitioners, find themselves forced to roll over a pension plan or 401(k) into an IRA at the termination of their employment will suddenly find their retirement funds no longer eligible for bankruptcy exemption. Individuals who put money into an IRA while living in jurisdictions that allow for the exemption, expecting the funds to be protected if they ever have to file for bankruptcy, will have their expectations frustrated if they subsequently move to a jurisdiction that denies the exemption and later file for bankruptcy there. And individuals aware of the conflict among the circuits may be wary of investing in an IRA at all because of the possibility of moving into a jurisdiction that denies the exemption. This uncertainty frustrates Congress's purpose in enabling the creation of IRAs: to encourage retirement savings. Only this Court can bring proper and final resolution to this important and heavily litigated issue.

III. Individual Retirement Accounts Are Eligible for Bankruptcy Exemption Under Section 522(d)(10)(E).

Certiorari is also warranted because the decision below is wrong on the merits. IRAs fall squarely within the exemption defined by Section 522(d)(10)(E). A straightforward application of the statute reveals that, as a matter of law, an IRA confers "the right to receive * * * a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or

[12] See *supra* note 6 (listing cases).

contract on account of illness, disability, death, age, or length of service."

The statute's text and structure make clear that IRAs are included within the exemption that Section 522(d)(10)(E) defines. Specifically, after identifying a group of plans and contracts that qualify for exemption, Section 522(d)(10)(E)(iii) then *denies* exemptions to certain plans and contracts that do *not* "qualify under section * * * 408 of the Internal Revenue Code." Section 408 is the provision that defines IRAs. See 26 U.S.C. 408(a), (c). Under settled principles of statutory construction, Section 522(d)(10)(E) must include at least some plans defined under Section 408; the explicit exclusion of plans that do not fall within Section 408 from the exemption would otherwise constitute mere surplusage. As the Ninth Circuit pointed out in *Farrar v. McKown*, 203 F.3d 1188, 1190 (CA9 2000), "[t]here could be no reason for legislators to exclude *non-qualifying* IRAs from the exemption, as the exception does, unless they intended that *qualifying* IRAs could be exempt. Indeed, there could be no reason even to mention Section 408, the IRA section, unless 'similar plan or contract' included them" (emphases added). Accord *Carmichael v. Osherow*, 100 F.3d 375, 378 (CA5 1996); *Dettmann v. Brucher*, 243 F.3d 242, 243 (CA6 2001); *Dubroff v. First Nat'l Bank of Glens Falls*, 119 F.3d 75, 77-78 (CA2 1997).

Despite the statute's specific inclusion of IRAs, the Third and Eighth Circuits nevertheless have drawn erroneous distinctions to exclude IRAs from exemption. Contrary to the Third Circuit's suggestion in *Clark*, *see* 711 F.2d at 23, the language of Section 522(d)(10)(E) does not distinguish between "present payments" and "future payments," nor does anything in the provision's text, structure, or legislative history suggest that Congress intended to draw any time- or age-based distinctions. "The language of the section does not include words like 'presently,' 'currently,' or 'immediately,'" *Carmichael*, 100 F.3d at 379, nor does it include any other indication of intent to exclude future payments. Indeed, such

an exclusion would be at odds with the statute's express inclusion of pension plans, profitsharing plans, and annuities, all of which involve an entitlement to future payments. The provision's legislative history explicitly states that "paragraph (10) exempts certain benefits that are akin to *future* earnings of the debtor." H.R. Rep. 95-595, at 362 (1977) (emphasis added). Like the other plans listed in the statute, "IRAs too are substitutes for future earnings." *Carmichael*, 100 F.3d at 378.

It is similarly unsupportable for the Eighth Circuit to exclude IRAs from exemption simply because holders may make early withdrawals subject to a tax penalty. Pet. App. 6a. The "right to receive payments" from an IRA is unquestionably triggered by four events – "age 59½," "death," "being disabled," or "medical care," see 26 U.S.C. 72(t)(2)(A)(i)-(iii) ; *id.* § 72(t)(2)(B)[13] – that precisely parallel four of the five alternative conditions for exemption set out in Section 522(d)(10)(E): "illness, disability, death, age, or length of service." Tax-penalized early withdrawal cannot be a basis for concluding that a plan does not qualify for exemption. Such withdrawal is not only a feature of all IRAs, but also of all the other instruments listed in the statute: stock bonuses, pensions, profitsharing plans, and annuities. See 26 U.S.C. 72(t) (permitting early withdrawal for "qualified retirement plans," which 26 U.S.C. 4974(c) defines to include all of the above-listed plans). The Eighth Circuit opinion is silent regarding whether its holding – requiring that a plan specifically bar early withdrawal in order to qualify for exemption – applies to these other types of plans as well as to

[13] Petitioners have a right to receive payments without penalty starting at the age of 59½, and are *required* to accept payments when they reach the age of 70½. See, *e.g.*, Petitioners' C.A. App. 58 ¶¶ 7, 10(A) (setting forth plan rules). Both of these features of petitioners' IRAs are statutory. See 26 U.S.C. 72(t) (penalizing withdrawal before age 59½); *id.* § 408(a)(6) (requiring payments after age 70½, as explained in 26 C.F.R. 1.408-8).

IRAs, but either way its reasoning is unjustified. Either the Eighth Circuit holds IRAs nonexemptible on the basis of a statutory feature they share in common with exemptible plans, or it holds that *no plan of any type* qualifies for exemption unless it contains an unheard-of provision barring early withdrawal. The first possibility is patently illogical, and the second creates an unprecedented rule so restrictive that it would effectively eviscerate the entire exemption. Cf. *Carmichael*, 100 F.3d at 379 (stating that "[n]o philosophical or economic distinction that would preclude an IRA's exemptibility can be drawn between relevant features of profitsharing plans and similar features of IRAs" and that profitsharing and other listed plans are "per se exemptible").

Because it conflicts with both the plain language and the intent of Section 522(d)(10)(E), the decision of the Eighth Circuit in this case should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas R. Brixey
Claude R. Jones
JONES LAW OFFICE
P.O. Box 1577
Harrison, AR 72602-1577

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

April 6, 2004[14]

---

[14] Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: David M. Cooper, Eric J. Feigin, and Nicola J. Mrazek. Clinic members Michael P. Abate, William B. Adams, Daniel S. Goldman, and Jennifer J. Thomas also contributed.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3505

IN RE: RICHARD GERALD ROUSEY; IN RE: BETTY JO ROUSEY,
DEBTORS.

RICHARD GERALD ROUSEY; BETTY JO ROUSEY, APPELLANTS,

v.

JILL R. JACOWAY, APPELLEE.

Submitted: March 10, 2003
Filed: Oct. 20, 2003

Appeal from the United States Bankruptcy Appellate Panel
for the Eighth Circuit

Before HANSEN, Chief Judge,[1] RILEY and MELLOY, Circuit Judges.

Opinion by Judge HANSEN.

OPINION

HANSEN, Circuit Judge.

---

[1] The author of the opinion stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2003. He has been succeeded by the Honorable James B. Loken.

Debtors Richard Gerald Rousey and Betty Jo Rousey appeal a judgment of the Eighth Circuit Bankruptcy Appellate Panel[2] affirming an order of the bankruptcy court[3] that disallowed claimed exemptions in two Individual Retirement Accounts (IRAs). The sole issue on appeal is whether the debtors' IRAs are exempt from the bankruptcy estate pursuant to 11 U.S.C. § 522(d)(10)(E). Following the precedent in this circuit, we hold that the funds are not exempt, and we affirm.

I.

The debtors filed a voluntary petition for relief under Chapter 7 of the bankruptcy code. Included in their assets were two IRAs valued at $42,915.32 and $12,118.16. Both debtors established these IRAs in the form of deposit accounts from funds rolled over from their previous employer's pension plans approximately two years before filing their bankruptcy petition. Neither debtor has deposited further funds into the IRAs since the initial deposits, and both debtors have the ability to withdraw funds from their accounts at any time subject only to early withdrawal tax penalties. The debtors claimed exemptions for $5,033 and $5,648--$10,681 in total--of these IRAs pursuant to 11 U.S.C. § 522(d)(5), and exemptions for the remaining amounts, $37,882.32 and $6,470.16--$44,352.48 in total--under 11 U.S.C. § 522(d)(10)(E). The bankruptcy trustee filed an objection to the § 522(d)(10)(E) exemptions but did not object to the debtors' § 522(d)(5) exemptions. Applying Eighth Circuit precedent, the bankruptcy court found that the IRAs were not

[2] The Honorable Robert J. Kressel, United States Bankruptcy Judge for the District of Minnesota, authored the opinion for a panel that included the Honorable Arthur B. Federman, Chief Judge, United States Bankruptcy Court for the Western District of Missouri, and the Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri, concurring.

[3] The Honorable Robert F. Fussell, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

exempt under 11 U.S.C. § 522(d)(10)(E), and the Bankruptcy Appellate Panel affirmed. The debtors appeal.

II.

A debtor in bankruptcy may claim an exemption pursuant to 11 U.S.C. § 522(d)(10)(E) for:

> a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; and (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E) (2000). Pursuant to this section, payments from the debtors' IRAs are exempt only if (1) the IRAs are a "pension, annuity, or similar plan or contract;" (2) the payments are made "on account of illness, disability, death, age, or length of service;" and (3) the payments are reasonably necessary for the debtors' support or the support of their dependents. Because neither the bankruptcy court nor the Bankruptcy Appellate Panel reached the issue of whether the payments are reasonably necessary for the debtors' support, we address only the first two statutory requirements.

A.

The bankruptcy courts relied on our decision in *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998), in concluding that the IRAs at issue in this case are not "similar

plans or contracts." In construing an Iowa statutory exemption "nearly identical" to § 522, the *Eilbert* court held that a single premium Individual Retirement Annuity contract (not a deposit account) that was purchased with nonexempt, inherited assets as a prebankruptcy planning measure by a prospective debtor who had already reached retirement age was not a "pension, annuity, or similar plan or contract." *See* 162 F.3d at 526-27. The court reasoned that single premium annuity investments are not "akin to future earnings" within the meaning of the Iowa statute nearly identical to § 522 because the payments did not replace lost income and were not established as part of a long-term retirement strategy. *Id.*

The debtors assert that *Eilbert* is inapposite because the Iowa statute did not contain the internal reference to 26 U.S.C. § 408, dealing exclusively with Individual Retirement Accounts and Individual Retirement Annuities, that appears in § 522(d)(10)(E)(iii). Adopting the reasoning of four of our sister circuits, the debtors argue that the reference to § 408 in the exceptions to exemption suggests that "at least some--if not all--IRAs were intended to be included in the phrase 'similar plan or contract.' "*Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375, 378 (5th Cir.1996); *see also Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242, 243 (6th Cir.2001) (quoting *Carmichael*); *Farrar v. McKown (In re McKown)*, 203 F.3d 1188, 1190 (9th Cir.2000) ("There could be no reason for legislators to exclude non-qualifying IRAs from the exemption, as the exception does, unless they intended that qualifying IRAs could be exempt. Indeed, there could be no reason even to mention section 408, the IRA section, unless 'similar plan or contract' included them."); *Dubroff v. First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75, 78 (2d Cir.1997) ("[I]f the statute excludes IRAs from exemption because they are not 'similar plans or contracts,' there would be no need for the reference to § 408 of the I.R.C., the statute governing IRAs, in [the state statute] and that reference would be surplusage."). The debtors also note that *Patterson v. Shumate*, 504 U.S. 753 (1992), offers

further support for this conclusion. In distinguishing between funds excluded from the bankruptcy estate pursuant to § 541(c)(2) and those that are included in the estate but otherwise qualify for exemption, the Supreme Court suggested in dicta that plans qualified under § 408 may be exempt under § 522(d)(10)(E). *See Patterson*, 504 U.S. at 762-63 (responding to the trustee's argument that a certain construction of § 541(c)(2) rendered § 522(d)(10)(E) surplusage by demonstrating that some plans not excludable still may be exemptible).

We agree with the debtors that the facts and law in *Eilbert* are distinguishable. Unlike Mrs. Eilbert, the Rouseys did not establish their IRAs as a prebankruptcy planning matter, but rather opened them with funds rolled over from a pension plan that had been established over time as part of a long-term retirement strategy and to which contributions had been made. We agree that where an individual retirement account serves as a substitute for future earnings, Congress would probably consider it a "similar plan or contract" as those explicitly listed in § 522(d)(10)(E). *See Carmichael*, 100 F.3d at 378 ("[T]o hold otherwise would be to create a trap for the unwary in those frequent instances in which funds from other exempt plans are 'rolled over' into IRAs when those other plans terminate or when employment ceases.").[4] Furthermore, to the extent that our sister circuits have relied upon § 522's internal reference to § 408, we agree that the federal statute is materially different from the Iowa statute at issue in *Eilbert* and that Congress probably intended some IRAs to be included as "similar plans or contracts." The dicta from the Supreme Court's opinion in *Patterson* supports this conclusion. However, if Congress had intended all IRAs which qualify under § 408 to be exemptible as a "similar plan

[4] Indeed, after our decision in *Eilbert*, the Iowa General Assembly amended its statute to explicitly exempt rollovers into § 408 IRAs. *See* Iowa Code § 627.6(8)(f)(2) (2003) (amended in 2001).

or contract," it would have been a very easy legislative task to have affirmatively accomplished.

B.

However, even if these debtors' individual retirement accounts qualify as "similar plans or contracts," in order to be eligible for exemption the payments made from them must be triggered by "illness, disability, death, age, or length of service." Our court in *Huebner v. Farmers State Bank*, 986 F.2d 1222 (8th Cir.) (applying the nearly identical Iowa statute), *cert. denied*, 510 U.S. 900 (1993), held that future payments from the corpus of an Individual Retirement Annuity are not "on account of age" where debtors have unfettered discretion to withdraw from the corpus at any time subject only to modest early withdrawal tax penalties. *See* 986 F.2d at 1225. Because the debtors here admit to having unlimited access to the funds in their IRAs, we find that *Huebner* directly controls and that these debtors' account withdrawals are not required to be made "on account of illness, disability, death, age, or length of service." We recognize that four of our sister circuits have reached a contrary result that may be more consistent with the purposes of § 522 and with their resolution of the "similar plan or contract" issue. We are constrained, however, by our precedent, and by our conclusion that these accounts are readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose.

III.

Faithful application of our circuit's binding precedent requires us to hold that the debtors' IRAs do not qualify for exemption under § 522(d)(10)(E). Accordingly, the judgment of the Bankruptcy Appellate Panel is affirmed.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE EIGHTH CIRCUIT

No. 02-6013WA.

IN RE RICHARD G. ROUSEY AND BETTY JO ROUSEY, DEBTORS.

RICHARD G. ROUSEY AND BETTY JO ROUSEY, APPELLANTS,

v.

JILL R. JACOWAY, APPELLEE.

Submitted: August 30, 2002
Filed: September 13, 2002

Appeal from the United States Bankruptcy Court for the Western District of Arkansas

Before KRESSEL, SCHERMER and FEDERMAN, Bankruptcy Judges.

KRESSEL, Bankruptcy Judge.

Richard and Betty Jo Rousey appeal from the bankruptcy court[1] order denying exemption of portions of

[1] The Honorable Robert F. Fussell, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

their Individual Retirement Accounts under 11 U.S.C. § 522(d)(10)(E). Because we think the bankruptcy court correctly applied Eighth Circuit precedents, we affirm.

BACKGROUND

The material facts are not in dispute. The debtors, Richard and Betty Jo Rousey, filed a voluntary joint Chapter 7 petition on April 27, 2001, appellee Jill R. Jacoway was appointed to serve as trustee in their case. The debtors elected to use the bankruptcy exemptions provided by 11 U.S.C. § 522(b)(1)[2] and found in 11 U.S.C. § 522(d). Listed on the debtors' Schedule B were their ownership interests in two IRAs. Both debtors established their IRAs in the form of deposit accounts at the First National Bank of Berryville, Arkansas[3] from funds rolled over from their Northrop Grumman[4] Plans. Neither debtor, however, has deposited any further money into their IRA since the initial deposits that established their accounts. Both debtors have the unfettered ability to withdraw funds from their accounts.

The IRA owned by Richard Rousey totaled $42,915.32 at the time of bankruptcy filing. Mrs. Rousey's IRA totaled $12,118.16 at the time of filing. Their Schedule C claimed $5,033.00 of Richard Rousey's IRA exempt under 11 U.S.C. § 522(d)(5)[5], and the remainder of $37,882.32 under 11 U.S.C. § 522(d)(10)(E). Betty Jo Rousey claimed as exempt $5,648.00 of her IRA under 11 U.S.C. § 522(d)(5) and the remainder of $6,470.16 under 11 U.S.C. § (d)(10)(E).

---

[2] 11 U.S.C. § 522(b) permits a debtor to choose between the bankruptcy exemptions provided in § 522(d) and the exemptions under state law, unless a state "vetoes" the debtor's option to choose the bankruptcy exemptions. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d 1222, 1224 (8th Cir.1993).

[3] Mr. Rousey established his IRA account in March of 1999. Mrs. Rousey established her IRA account in April of 1999.

[4] Northrop Grumman is the debtors' former employer.

[5] 11 U.S.C. § 522(d)(5) allows the exemption of "any property" subject to the monetary limitations set out.

On August 3, 2001, the trustee filed an objection to the exemption claims and argued that the Rouseys are not entitled to claim exemptions of the IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) in the total amount of $44,352.48. She asked that the non-exempt portions be turned over to her. The trustee does not object to the debtors' claimed exemption in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5). On February 13, 2002, the bankruptcy court entered its order sustaining the trustee's objection and granting her motion. The court determined that the IRAs did not qualify as "similar plans or contracts" under 11 U.S.C. § 522(d)(10)(E) because the debtors had unfettered discretion to withdraw from the corpus. The court also determined that payments under the plans were not on account of illness, disability, death, age or length of service as required under that section. The debtors filed a timely appeal.

DISCUSSION

Standard of Review

"We review a bankruptcy court's conclusions of law de novo and its factual findings under the clearly erroneous standard." *Merchants Nat'l Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 790 (8th Cir. BAP 1999) (quoting *Sinclair Oil Co. v. Jones (In re Jones)*, 31 F.3d 659, 661 (8th Cir.1994)).

EXEMPTION UNDER 522(D)(10)(E)

Similar Plan or Contract

11 U.S.C. § 522(d)(10)(E) provides an exemption for:

> a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death,

> age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; and (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E). There are essentially three main requirements that a debtor must meet to properly claim as exempt payments from an investment plan/income stream: payments are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor. *Andersen v. Ries (In re Andersen)*, 259 B.R. 687, 691 (8th Cir. BAP 2001). To help define what encompasses the generic phrase "similar plan or contract" the court in *Eilbert v. Pelican*[6] used the interpretive canons *noscitur a sociis* (a term is known from its associates) and *ejusdem generis* (general words in an enumeration are construed as similar to more specific words in the

---

[6] The Eighth Circuit B.A.P. in *Eilbert v. Pelican*, was interpreting Iowa Code § 627.6(8)(e). This section provided an exemption for a debtor's interest in a "payment or portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service." The Iowa Code section is very similar to the text in 11 U.S.C. § 522(d)(10)(E), and the Court's analysis of the Iowa Code section is useful in helping to interpret the similar text within § 522(d)(10)(E). Although the Iowa statute has now been changed, the analysis of its former language remains apropos.

enumeration). *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523, 527 (8th Cir.1998). These canons are employed "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* at 527 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).The court in *Eilbert* used the specific term "pension" as a touchstone to help define the general term "annuity" and the phrase "similar plan or contract." As required by the Eighth Circuit we apply those interpretive canons here.

A pension is a retirement benefit paid regularly based on length of employment and amount of wages or salary, in other words, deferred compensation for services rendered. *Id.*; Blacks Law Dictionary 1134 (6th ed.1990). Since the word pension is the more specific word, it restricts the meaning of "similar plan or contract" under 11 U.S.C. § 522(d)(10)(E). *Id.* This catchall provision includes within the exemption other types of retirement plans or investments that are "created to fill or supplement a wage or salary void." *Id.*; (quoting *Matter of Pettit*, 55 B.R. 394, 397-98 (Bankr.S.D.Iowa)), *aff'd*, 57 B.R. 362 (S.D.Iowa 1985). Congress described the federal exemption as exempting "certain benefits that are akin to future earnings of the debtor." H.R.Rep. 95-595, at 362 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6318. Thus, the purpose of exempting the right to payments under a pension, annuity, or similar plan is to protect payments which function as wage substitutes after retirement. *Eilbert*, 162 F.3d at 526-527. Under Eighth Circuit Court of Appeals precedent, the debtors' IRAs do not come within the purpose of the exemption provision and do not meet the definition of similar plan or contract because the payments from their IRA are not "similar" to pensions.

We have listed a number of factors to help courts analyze this issue. First, in both *Andersen* and *Eilbert*, we stated that contributions made to an investment over time, rather than one lump sum, would make it more likely that the investment falls within the ambit of the statute. *Andersen v. Ries (In re Andersen)*, 259 B.R. 687, 691 (8th Cir. BAP

2001); *Eilbert v. Pelican*, 212 B.R. 954, 958-959 (8th Cir. BAP 1997). Neither Richard Rousey nor his wife Betty contributed any money to the IRA accounts other than the initial lump sum contribution that established their accounts.

Second, in *Andersen* and *Eilbert* we held that contributions made by multiple contributors, rather than investments purchased in isolation and outside the context of workplace contributions, are more likely to qualify as exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. Although the money deposited in the debtors' IRA accounts were initially traceable to funds rolled over from a plan established with their former employer Northrop Grumman, once the debtors' employment terminated, all funds received from the Northrop Grumman plan became the property of the debtors who were free to dispose of such funds in whatever way they chose. The debtors, instead of using the funds to buy a car or take a vacation, decided to deposit the money into an IRA that gave them unfettered discretion to the corpus. At the time they made the lump sum contribution to establish their IRAs, they were the only contributors because the funds deposited were solely their own. Thus, there were no multiple contributors to the debtors' IRAs. Moreover, their accounts were established outside the context of workplace contributions.

Third, in *Andersen* and *Eilbert* we looked at the return on investment. An investment that returns only the initial contribution of the debtor with earned interest or income, no more and no less, is more than likely not an exempt investment. Yet those investments that compute payments based on the participant's life span and terminate upon his death are more likely to be exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. The only return on investment the debtors would likely receive are portions of the initial payment they made to establish their IRAs and any interest that may have accrued on that payment.

Finally, in *Andersen* and *Eilbert* we examined the amount of control the debtor exercises over the claimed asset. If the terms of the investment impose limitations[7] on the debtor's right to withdrawal, then it is more likely that the investment comes within the ambit of the statute. Yet if the debtor, at his discretion, is able to access the funds of his investment and designate the date of disbursement, subject only to contractual or tax penalties, then such an investment is less likely to be exempt under 11 U.S.C. § 522(d)(10)(E). *Andersen*, 259 B.R. at 691; *Eilbert*, 212 B.R. at 959. Both of the debtors admitted that their ability to access the funds of their IRAs were completely at their discretion and the only "limitation" on that access would be a ten percent tax penalty, which has not been regarded by the Eighth Circuit as a substantial limit to withdrawal. *Eilbert v. Pelican*, 162 F.3d 523, 528 (8th Cir.1998).

Reference to 26 U.S.C. § 408

11 U.S.C. § 522(d)(10)(E)(iii) makes reference to 26 U.S.C. § 408 which is the provision of the Internal Revenue Service Code that deals exclusively with IRAs. The debtors argue that by virtue of this reference their IRAs were intended to be included in the phrase "similar plan or contract" and thus exempt under 11 U.S.C. § 522(d)(10)(E). The debtors cite the case of *Patterson v. Shumate*, 504 U.S. 753 (1992), among others, to support this argument.

The Supreme Court in *Patterson* stated that the "applicable non-bankruptcy law" text of 11 U.S.C. § 541(c)(2) applies to federal and state law. *Id.* at 759. Moreover, the Court stated that ERISA-qualified trusts are excluded from the bankruptcy estate by virtue of ERISA's anti-alienation clause. *Id.* at 760. The Court, however, did not

[7] We have held that the tax and contractual penalties that are triggered when the IRA funds are withdrawn before age fifty nine and a half may not necessarily be regarded as a limit to withdrawal. *Eilbert*, 212 B.R. at 959.

rule on the issue of whether investment plans qualifying for preferential tax treatment under 26 U.S.C. § 408 and established for the purpose of funding retirement income, but not specifically covered by ERISA's anti-alienation clause, would qualify for exemption under 11 U.S.C. § 522(d)(10)(E). What the Court stated in dicta, however, was that such investment plans could be exempted under 11 U.S.C. § 522(d)(10)(E) because that section of the Bankruptcy Code is broader than § 541(c)(2), and applies to more than merely ERISA-qualified plans containing alienation provisions. *Id.* at 762-763. Thus, the Supreme Court's statements in *Patterson* regarding exemption of IRAs is not very helpful to the debtors.

The debtors also cite *Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375, 378 (5th Cir.1996), and *Dettmann v. Brucher (In re Brucher)*, 243 F.3d 242, 243 (6th Cir.2001), among others,[8] to support their proposition that the internal reference to 26 U.S.C. § 408 in 11 U.S.C. § 522(d)(10)(E) implies that IRAs were intended to be included in the phrase "similar plan or contracts." The Sixth Circuit in *In re Brucher*, quoting the Fifth Circuit in *In re Carmichael*, 100 F.3d at 378, stated:

> § 522(d)(10)(E)(iii) specifically denies exemption to those "similar plans or contracts" that fail to qualify under § 408 of the Internal Revenue Code, a provision dealing exclusively with IRAs. This express Code-section reference to IRAs in the exception makes inescapable the conclusion that at least some--if not all--IRAs were intended to be included in the phrase "similar plan or contract." Were that not so, there would be no exempt § 408 plans or contracts from which non § 408 plans or contracts could be exceptions.

[8] The debtors also cite *In re Dubroff*, 119 F.3d 75 (2nd Cir.1997) and *In re McKown*, 203 F.3d 1188 (9th Cir.2000).

In re Brucher, 243 F.3d at 243. The rule adopted in these cases is often labeled the "Per Se Exemption"[9] and adoption of this rule requires expanding norms of statutory construction that many courts are unwilling to make. *In re Billy R. Skipper*, 274 B.R. 807, 817 (Bankr.W.D.Ark.2002). Courts that have adopted the Per Se Exemption argue that holding otherwise would render the mention of 26 U.S.C. § 408 in subparagraph (d)(10)(E)(iii) of 11 U.S.C. § 522 surplusage. *Id.* Adopting the Per Se Exemption of IRAs, however, would also render the "similar plan or contract" language of § 522(d)(10)(E) surplusage in cases involving IRAs. *Id.*

Contrary to the interpretation given by some courts, there is nothing explicit within the Bankruptcy Code, the legislative history, or 11 U.S.C. § 522(d)(10)(E) itself which manifests Congressional intent to exempt IRA retirement plans in toto. In interpreting 11 U.S.C. § 522(d)(10)(E), we are mindful of the principle that exemption statutes should be construed liberally in favor of the debtor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631-632 (8th Cir.1991). The liberal construction of exemption statutes, however, is not a license to circumvent legislative intent. As the Supreme Court in *Connecticut National Bank v. Germain* stated, "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). When a statute's language is plain, the sole function of the courts is to enforce such language according to its terms, not to expand the statute's meaning. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (stating where the statute's language is plain,

[9] It is hardly a "per se" rule. The opinion explicitly uses the word "some."

"the sole function of the courts is to enforce it according to its terms.") (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Thus IRA plans would still have to meet the requirements under 11 U.S.C. § 522(d)(10)(E) in order for IRA funds to be exempt under that provision.

The premise of the "per se" rule seems to be that an IRA could never meet the "similar plan or contract" or "payable on account of" tests so somehow those tests must not apply, otherwise the reference to § 408 would have no significance. We think this legal assumption and the statutory analysis are both wrong. The types of IRA investments that the debtors could have chosen is extremely broad. They could have chosen to use it to purchase annuities that limited their access and started payments to them when they reached a certain age. Instead they chose to put it into a bank account, to which they had unlimited access. Secondly, as a matter of statutory construction, 11 U.S.C. § 522(d)(10)(E)(iii) is a *limitation* on the right to claim an exemption. We have trouble elevating a limitation into a new per se exemption.

On Account of Illness, Disability, Death, Age or Length of Service

The bankruptcy court determined that the debtors' right to payment from their IRAs is not on account of illness, disability, death, age or length of service as required by the statute and Eighth Circuit precedents. For example, in *In re Huebner*, the Eighth Circuit Court of Appeals stated that because Huebner had complete access and control over the withdrawal and the timing of his annuity payments, that any payments received were not on account of his age or any other of the triggering events within the statute. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d 1222, 1225 (8th Cir.1993). Similarly, in *Eilbert v. Pelican*, the Eighth Circuit Court of Appeals stated that because the debtor had unfettered discretion to withdraw the funds from her annuity before age fifty nine and a half, subject only to a

relatively modest ten percent federal tax penalty, the debtor's control over her annuity was not substantially restricted and consequently the payments were not on account of her age. *Eilbert v. Pelican*, 162 F.3d 523, 527-528 (8th Cir.1998). The fact that the debtors in this case have complete discretion over the withdrawal of their IRA funds, subject only to a ten percent tax penalty, shows there is no substantial restriction to withdrawal and that payments of such funds are not on account of any factor listed in 11 U.S.C. § 522(d)(10)(E). The fact that the debtors have unfettered discretion to withdrawal causes their IRAs to look less like exempt retirement plans and more like non-exempt bank savings accounts with favorable tax treatment. *Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner)*, 986 F.2d at 1225.

The debtors have argued that if we hold that their IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E), we would be adopting a "per se" rule that all IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E). This simply is not the case. As noted earlier not all IRAs are alike. While each case must be decided on its own facts, we do not think that either the bankruptcy court's ruling or our opinion constitutes a decision that an IRA could never be exempt.

CONCLUSION

The bankruptcy court correctly concluded that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. § 522(d)(10)(E). The debtors' IRAs are not similar plans or contracts pursuant to the statute, nor are the payments under the IRAs on account of illness, disability, death, age or length of service. The judgment of the bankruptcy court is affirmed.

SCHERMER, Bankruptcy Judge concurring.

I concur in the holding that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. §

522(d)(10)(E) based upon precedent of our Circuit. However, I would invite our Circuit to revisit this issue where, as here, the debtors' pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman, but they are not exempt where the debtors filed after their employment ceased and they rolled over the proceeds of their Northrop Grumman pensions into IRAs. Each Circuit which has examined the issue has held that IRAs may be exempt under Section 522(d)(10)(E). *See In re Brucher*, 243 F.3d 242 (6th Cir.2001); *In re McKown*, 203 F.3d 1188 (9th Cir.2000); *In re Dubroff*, 119 F.3d 75 (2nd Cir.1997); and *In re Carmichael*, 100 F.3d 375 (5th Cir.1996).

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
HARRISON DIVISION

No. 3:01-BK-13241

IN RE RICHARD GERALD ROUSEY AND BETTY JO ROUSEY,
DEBTORS.

Feb. 13, 2002.

Order Sustaining Trustee's Objection to Exemptions and Granting Motion for Turnover

ROBERT F. RUSSELL, Bankruptcy Judge.

Pending before the Court is the "Objection to Claim of Exemptions and Motion for Turnover" filed by Jill Jacoway, the chapter 7 trustee (the "Trustee"), on August 3, 2001. The Court conducted an evidentiary hearing on the objection to exemptions and motion for turnover on October 24, 2001. For the reasons stated below, the Trustee's objection to exemptions is sustained and her motion for turnover is granted.

I. *Jurisdiction.*

This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(B) and (E). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052(a).

II. *Findings of Fact.*

Richard Gerald Rousey and Betty Jo Rousey ("Debtors") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on April 27, 2001. Debtors' Schedule B, "Personal Property," lists Debtors' interests in two IRAs at the First National Bank in Berryville, Arkansas, specifically, IRA CERT # 208221 in the name of Richard Gerald Rousey, and IRA CERT # 208345 in the name of Betty Jo Rousey (collectively the "IRAs"). On Debtors' Schedule C, "Property Claimed as Exempt," Debtors claimed the following exemptions of the IRAs:

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemption
IRA CERT # 208221 First National Bank, Berryville, AR	11 U.S.C. § 522(d)(5)	5,033.00	42,915.32
	11 U.S.C. § 522(d)(10)(E)	37,882.32	
IRA CERT # 208345 First National Bank, Berryville, AR	11 U.S.C. § 522(d)(5)	5,648.00	12,118.16
	11 U.S.C. § 522(d)(10)(E)	6,470.16	

On August 3, 2001, the Trustee filed an objection to exemptions and motion for turnover, and argued that Debtors are not entitled to claim exemptions of the IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) in the total amount of $44,352.48. The Trustee does not object to Debtors' claimed exemptions

in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5).

On October 24, 2001, the Court conducted an evidentiary hearing on the Trustee's objection to exemptions and motion for turnover. At the hearing, the parties stipulated to the amounts and account numbers of the IRAs, as set forth above. The Court heard the testimony of Debtors, who each testified that it is their understanding that they can withdraw money from the IRAs at any time, subject to a 10% tax penalty. At the conclusion of the hearing, upon the request of the parties, the Court continued the matter to allow for additional discovery and the introduction of additional evidence as to the extent to which the IRAs are reasonably necessary for the support of Debtors. In addition, the Court informed the parties that it would rule in the interim on the issue of whether Debtors' ability to withdraw money from the IRAs at any time renders 11 U.S.C. § 522(d)(10)(E) inapplicable to this case as a matter of law.

On December 21, 2001, the parties filed a joint stipulation, admitting into evidence copies of the IRA custodial account agreements pertaining to the IRAs. The two account agreements are identical, and, with regard to distribution, provide as follows:

> 1. Notwithstanding any provision of this agreement to the contrary, the distribution of the Depositor's interest in the custodial account shall be made in accordance with the following requirements and shall otherwise comply with section 408(a)(6) and Proposed Regulations section 1.401(a)(9) 2, the provisions of which are incorporated by reference.
> 2. Unless otherwise elected by the time distributions are required to begin to the Depositor under paragraph 3, or to the surviving spouse under paragraph 4, other than

in the case of a life annuity, life expectancies shall be recalculated annually. Such election shall be irrevocable as to the Depositor and the surviving spouse and shall apply to all subsequent years. The life expectancy of a nonspouse beneficiary may not be recalculated.

3. The Depositor's entire interest in the custodial account must be, or begin to be, distributed by the Depositor's required beginning date, (April 1 following the calendar year end in which the Depositor reaches age 70 1/2). By that date, the Depositor may elect, in a manner acceptable to the Custodian, to have the balance in the custodial account distributed in:

(a) A single sum payment.

(b) An annuity contract that provides equal or substantial equal monthly, quarterly, or annual payments over the life of the Depositor.

(c) An annuity contract that provides equal or substantially equal monthly, quarterly, or annual payments over the joint and last survivor lives of the Depositor and his or her designated beneficiary.

(d) Equal or substantially equal annual payments over a specified period that may not be longer than the Depositor's life expectancy.

(e) Equal or substantially equal annual payments over a specified period that may not be longer than the joint life and last survivor expectancy of the Depositor and his or her designated beneficiary.

4. If the Depositor dies before his or her entire interest is distributed to him or her, the entire remaining interest will be distributed as follows:

(a) If the Depositor dies on or after distribution of his or her interest has begun, distribution must continue to be made in accordance with paragraph 3.

(b) If the Depositor dies before distribution of his or her interest has begun, the entire remaining interest will, at the election of the Depositor, or if the Depositor has not so elected, at the election of the beneficiary or beneficiaries, either

(i) Be distributed by the December 31 of the year containing the fifth anniversary of the Depositor's death, or

(ii) Be distributed in equal or substantially equal payments over the life or life expectancy of the designated beneficiary or beneficiaries starting by December 31 of the year following the year of the Depositor's death. If, however, the beneficiary is the Depositor's surviving spouse, then this distribution is not required to begin before December 31 of the year in which the Depositor would have turned 70 1/2.

(c) Except where distribution in the form of an annuity meeting the requirements of section 408(b)(3) and its related regulations has irrevocably commenced, distributions are treated as having begun on the Depositor's required beginning date, even though payments may actually have been made before that date.

(d) If the depositor dies before his or her entire interest has been distributed and if the beneficiary is other than the surviving spouse, no additional case contributions or rollover contributions may be accepted in the account.

Both IRA agreements included an IRA Disclosure Statement, which states the following regarding withdrawals:

> 10. **Federal Penalties.** In addition to the taxes imposed on IRAs, distributions from IRAs are also potentially subject to a wide variety of penalties (excise taxes).
> A. **Penalty for Premature Distribution.** Generally, if you take a distribution from your IRA before you reach the age 59 1/2 , you will owe, in addition to regular income taxes, a 10% excise tax on the taxable amount of the distribution. Exceptions to the 10% excise tax in the case of disability, death, a first home, qualified higher education expenses, distribution for health care expenses exceeding 7.5% of your adjusted gross income, distributions used to pay for health care insurance if you are unemployed, or if you agree to take a series of substantially equal periodic payments made over your life expectancy or the joint life expectancy of yourself and your designated beneficiary.

Based on the language of the IRA agreements, the Court finds that Debtors have an immediate right to withdraw the funds in the IRAs. The only impediment to the Debtors' right to withdraw is the 10% excise tax penalty referenced in the IRA Disclosure Statement.

III. *Conclusions of Law.*

The Trustee does not dispute that Debtors are entitled to exempt $10,681.00 of the IRAs pursuant to 11 U.S.C. § 522(d)(5). The only issue before the Court is whether Debtors are entitled to exempt the remaining $44,352.48 of the IRAs

pursuant to 11 U.S.C. § 522(d)(10)(E), which provides:

> (d) The following property may be exempted under subsection (b)(1) of this section:
> (10) The debtor's right to receive—
> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
> (ii) such payment is on account of age or length of service; and
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E).

In interpreting § 522(d)(10)(E), the Court is mindful of the familiar principle that "exemption statutes must be construed liberally in favor of the debtor and in light of the purposes of the exemption." *In re Andersen*, 259 B.R. 687, 690 (8th Cir. BAP 2001) (citing *In re Wallerstedt*, 930 F.2d 630, 631 (8th Cir.1991)). However, the liberal construction of exemption statutes is "for the purpose of achieving the legislative intent, not to 'extend the provisions of the legislative grant.' " *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998) (citations omitted). The purpose of exempting the right to payments under a pension, annuity, or similar plan is to "protect payments which function as wage substitutes after retirement." *Id.* The exemption is intended to

protect payments that "support basic living requirements during the time of life when earning capacity is limited by age, disability, or illness." *Id.*

The Eighth Circuit Bankruptcy Appellate Panel has crafted a three prong test for the § 522(d)(10)(e) exemption. Specifically, the right to payment is exempt only to the extent the following conditions apply:

> (1) they [the payments] are received pursuant to a "pension, annuity, or similar plan or contract,"
> (2) "on account of illness, disability, death, age or length of service," and
> (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor.

Id. (citing generally to *Eilbert*, 162 F.3d at 527-28). Pursuant to Federal Rule of Bankruptcy Procedure 4003(c), the Trustee has the burden to demonstrate that the conditions of the exemption are not met. *Id.* If any of the conditions of the exemption are not met, Debtors may not claim the exemption.

A. *Are the payments received pursuant to a pension, annuity, or similar plan or contract?*

The Court must first determine whether the IRAs constitute pensions, annuities, or similar plans or contracts within the meaning of § 522(d)(10)(E). Section 522(d)(10)(E), particularly as applied to IRAs that qualify for tax-exempt status under § 408 of the Internal Revenue Code, has been the subject of much judicial interpretation, and a significant amount of judicial consternation.[1] It seems the

[1] One court has described the language of § 522(d)(10)(E) as "seemingly irreconcilable" and requiring a navigation between the " 'Scylla of rigid

number of different judicial interpretations of the § 522(d)(10)(E) exemption is limited only to the number of courts that analyze the issue.

At least four of the circuit courts of appeals have reached the conclusion that "some--if not all--IRAs were intended to be included in the phrase 'similar plan or contract.' "*In re Carmichael*, 100 F.3d 375, 378 (5th Cir.1996); see also *In re Dubroff*, 119 F.3d 75 (2d Cir.1997); *In re McKown*, 203 F.3d 1188 (9th Cir.2000); *In re Brucher*, 243 F.3d 242 (6th Cir.2001). Although each of the four circuits employs a unique analysis of the issue, each of the four opinions contains a common thread--the notion that Congress's mention of Internal Revenue Code § 408 in subparagraph (d)(10)(E)(iii) compels a holding that Congress intended for IRAs to be included in the § 522(d)(10)(E) exemption.

The *Carmichael* court noted that subparagraph (d)(10)(E)(iii) "specifically denies exemption to those 'similar plans or contracts' that come within the proscription of (d)(10)(E)(i) and (d)(10)(E)(ii) and also fail to qualify under ... § 408." *Carmichael*, 100 F.3d at 378. The *Carmichael* court surmised that if IRAs are not "similar plans or contracts," "there would be no exempt § 408 plans or contracts from which ... § 408 plans or contracts could be exceptions." *Id.* The *Carmichael* court also proposed that IRAs should be included in the exemption because they are substitutes for future earnings; to hold otherwise would penalize self-employed individuals who chose to depend on IRAs for retirement; and "exempting IRAs comports with the very policy furthered by exemptions-providing the honest debtor with a fresh start" by "protecting a debtor's future income stream." *Id.*

The *Dubroff* court, interpreting a New York statute materially identical to § 522(d)(10)(E), rejected the

construction' and the 'Charybdis of meaninglessness.' "*In re Dale*, 252 B.R. 430, 432 (Bankr.W.D.Mich.2000).

proposition that its "initial task in interpreting [the exemption] is to determine whether an IRA is a 'similar plan or contract.'" *Dubroff*, 119 F.3d at 77. The court reasoned that "if [it] were to do so and reach the conclusion that an IRA was not a 'similar plan or contract,' [subparagraph (iii)] would become surplusage." *Id.*

The *McKown* court, citing *Carmichael* and *Dubroff*, posed the rhetorical question "[w]hy would Congress talk about IRAs in the exception unless it included IRAs in the rule?" *McKown*, 203 F.3d at 1190. The court concluded that "[Congress] would not. ... There could be no reason for legislators to exclude non-qualifying IRAs from the exemption, as the exception does, unless they intended that qualifying IRAs could be exempt." *Id.*

The most recent circuit court decision on the issue, *Brucher*, essentially follows the reasoning set forth in *Carmichael*. The *Brucher* court determined that "[i]f IRAs were never to be exempted under § 522(d)(10)(E), the inclusion in subsection (iii) of the reference to section 408 would have been utterly pointless." *Brucher*, 243 F.3d at 243.

Debtor urges the Court to follow the reasoning set forth in *Carmichael*, *Dubroff*, *McKown*, and *Brucher*, and hold that Debtor's IRA is a "similar plan or contract" under § 522(d)(10)(E). However, for the Court to so hold, it would have to ignore considerable Eighth Circuit precedent.

The Eighth Circuit first interpreted the phrase "similar plan or contract" in *Huebner v. Farmers State Bank (In re Huebner)*, 986 F.2d 1222 (8th Cir.1993). In *Huebner*, the issue before the court was whether the debtor could claim an exemption in two flexible premium annuities. Both annuities qualified as IRAs under § 408 of the Internal Revenue Code. *Huebner*, 986 F.2d at 1224. The exemption issue was analyzed under an Iowa statute, as Iowa has opted out of the federal exemption scheme. The Iowa statute at issue was materially similar to § 522(d)(10)(E), allowing debtor to exempt the right to payment under "a pension, annuity, or similar plan or contract on account of illness, disability, death,

age or length of service." *Id.* The Eighth Circuit later described the Iowa statute as "nearly identical" to and "borrowed from" § 522(d)(10)(E).[2]

Like the Debtors in this case, the debtor in *Huebner* had "the unfettered discretion to receive payments at any time ... subject only to relatively modest penalties for withdrawals before age 59 1/2 ." *Id.* The court determined that the debtor's "access to and complete control over the timing of the annuity payments mean[s] that any payments received under the contracts would not be 'on account of' his age." *Id.* Accordingly, the court determined that the IRAs were not "similar plans or contracts." In so holding, the court observed that the debtor "could have invested his savings in retirement annuities that prevented him from withdrawing funds prior to his reaching retirement age, in which event retirement payments under those annuities would have been exempt." *Id.* Instead of choosing that option, the debtor "decided to invest in annuities that place virtually no restrictions on his right to withdraw." *Id.* The court found that "[s]uch assets are essentially 'bank savings accounts' with favorable tax treatment." *Id.*

The Eighth Circuit Bankruptcy Appellate Panel (the "B.A.P.") analyzed the "similar plan or contract" language of the Iowa statute in *Eilbert v. Pelican (In re Eilbert)*, 212 B.R. 954 (8th Cir. BAP 1997). The B.A.P. identified four factors a court may use to aid its determination of whether a particular annuity is a "similar plan or contract." First, a court may consider whether the debtor made contributions to the annuity over time. *Id.* at 958-59. Second, a court may consider whether the investment was purchased in isolation, or whether it included contributions by others. *Id.* at 959. Third, a court may look to the debtor's return on an investment. *Id.* Finally, a court may consider the extent to which the debtor may

---

[2] The Court recognizes that the Iowa statute lacked the internal reference to § 408 that influenced the holdings in *Carmichael*, *Dubroff*, *McKown*, and *Brucher*.

control the annuity. The court held that "if the debtor has complete discretion to withdraw the entire corpus, then the contract resembles a non-exempt investment." *Id.* The final factor was apparently conclusive to the B.A.P. Because the debtor "enjoyed unfettered discretion to liquidate the corpus at any time, subject only to contractual penalties assessed against principal," the B.A.P. determined that the annuity was not a "similar plan or contract." *Id.* at 959-60. In addition, the B.A.P. stated that "[a] contractual or tax penalty is not necessarily a limitation on withdrawal." *Id.* at 959.

The B.A.P. decision was affirmed by the Eighth Circuit. *Eilbert v. Pelican (In re Eilbert)*, 162 F.3d 523 (8th Cir.1998). In affirming the B.A.P.'s decision, the court stated that "similar plan or contract" includes within the exemption "retirement plans or investments that are 'created to fill or supplement a wage or salary void.' " *Eilbert*, 162 F.3d at 527. Because the debtor's annuity did not replace lost income, was not purchased with contributions over time as part of a long term retirement strategy, and was purchased as a pre-bankruptcy planning measure, the court determined that the annuity was not a "similar plan or contract" included within the exemption. *Id.*

The B.A.P. recently re-visited the "similar plan or contract" issue in *Andersen v. Ries (In re Andersen)*, 259 B.R. 687 (8th Cir. BAP 2001). In *Andersen*, the debtor used a $40,000.00 inheritance to purchase an annuity in lieu of a retirement plan. *Andersen*, 259 B.R. at 689. Before reaching retirement age, and before filing bankruptcy, the debtor made the required election on the annuity to state the date on which she would begin receiving payments. *Id.* Upon making the election, the debtor lost the discretion to withdraw, settle, or surrender the corpus of the annuity. *Id.* At the time she filed bankruptcy, the debtor was retired and receiving monthly annuity payments. *Id.*

In *Andersen*, the B.A.P. looked to the analysis performed in *Eilbert*, and stated that "numerous factors may be considered" in determining whether an annuity is a

"similar plan or contract." As in *Eilbert*, the B.A.P. stated that specific queries may include:

> * Were the payments designed or intended to be a wage substitute?
> * Were the contributions made over time? The longer the period of investment, the more likely the investment falls within the ambit of the statute and is the result of a long standing retirement strategy, not merely a recent change in the nature of the asset.
> * Do multiple contributors exist? Investments purchased in isolation, outside the context of workplace contributions, may be less likely to qualify as exempt.
> * What is the return on investment? An investment which returns only the initial contribution with earned interest or income is more likely to be a nonexempt investment. In contrast, investments which compute payments based upon the participant's estimated life span, but which terminate upon the participant's death or the actual life span, are akin to a retirement investment plan. That is, will the debtor enjoy a windfall if she outlives her life expectancy? Is she penalized if she dies prematurely?
> * What control may the debtor exercise over the asset? If the debtor has discretion to withdraw from the corpus, then the contract most closely resembles a nonexempt investment.

FN1. This was the obstacle that the debtor in *Huebner v. Farmers State Bank (In re Huebner)*, 986 F.2d 1222 (8th Cir.), *cert. denied*, 510 U.S. 900, 114 S.Ct. 272, 126 L.Ed.2d 223 (1993) could not overcome.

Andersen, 259 B.R. at 691.

The Eighth Circuit's analysis of the "similar plan or contract" issue stands in stark contrast to the *Carmichael*, *Dubroff*, *McKown*, and *Brucher* holdings, each of which suggests that IRAs fall within the "similar plan or contract" language *per se*. This Court is bound to follow the precedent of the Eighth Circuit.[3] Moreover, this Court is convinced that the Eighth Circuit analysis is the better rule of law.

The rule adopted in *Carmichael*, *Dubroff*, *McKown*, and *Brucher* (the "Per Se Exemption") requires leaps of statutory construction that this Court is not willing to make. The courts that have adopted the Per Se Exemption argue that holding otherwise would render the mention of § 408 in subparagraph (d)(10)(E)(iii) of § 522 surplusage. However, this Court believes that adopting a Per Se Exemption of IRAs would render the "similar plan or contract" language of paragraph (d)(10)(E) surplusage in cases involving IRAs.[4]

This Court, like another court that researched the issue, "cannot find anything within the Bankruptcy Code or the legislative history which manifests a Congressional intent to exempt retirement plans in toto." *In re Dale*, 252 B.R. 430,

[3] None of the Eighth Circuit cases cited herein involve both the federal § 522(d)(10)(E) exemption and a § 408 IRA. Nonetheless, the Court finds no indication in the Eighth Circuit opinions that the court would forego its analysis of the "similar plan or contract" requirement merely because subparagraph (iii) of § 522(d)(10)(E) mentions § 408.

[4] Moreover, the Court perceives an inconsistency in the manner the *Carmichael* court applied the Per Se Exemption. Specifically, the *Carmichael* court dispensed of the "similar plan or contract" and "on account of illness, disability, death, age, or length of service" requirements of paragraph (d)(10)(E), but nonetheless imposed the "reasonable necessary for the support of the debtor and any dependent of the debtor" requirement of (d)(10)(E). If the *Carmichael* court determined that (d)(10)(E)(iii) requires the exemption of IRAs *per se*, then all IRAs, even those not reasonably necessary for support, should be exempt. The Court does not believe that Congress intended such a result.

434 (Bankr.W.D.Mich.2000). In fact, the evidence is quite to the contrary. If Congress intended to enact a Per Se Exemption of § 408 IRAs, it could have done so by simply stating that "a right to receive payment from an individual retirement annuity qualified for tax exempt status under 26 U.S.C. § 408 shall be exempt." In the absence of such a specific enactment, the Court refuses to infer that Congress manifested any such intent by mentioning § 408 in subparagraph (iii) of § 522(d)(10)(E).

Statutory provisions, such as subparagraph (d)(10)(E)(iii), must be construed *in pari materia*, that is, in reference to one another. *In re Zott*, 225 B.R. 160, 167 (Bankr.E.D.Mich.1998). Statutory language must be evaluated in context, and the Supreme Court has observed that the plain meaning a court should attempt to discern is the plain meaning of the whole statute, not of isolated sentences. *Beecham v. United States*, 511 U.S. 368, 372 (1994). Courts should avoid interpretations that render statutory terms as surplusage. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995). If at all possible, courts should strive to read the provisions of a statute as harmonious with each other.

The Court concludes that the most harmonious interpretation of § 522(d)(10)(E) is that Congress intended to exempt § 408 IRAs to the extent they are "similar plans or contracts"; payable "on account of illness, disability, death, age or length of service"; and "reasonably necessary for the support of the debtor and any dependent of the debtor." This interpretation gives meaning to the requirements of paragraph (d)(10)(E), without ignoring the mention of § 408 in subparagraph (d)(10)(iii). Under this interpretation, no part of the statute is surplusage.[5]

[5] One might argue that this interpretation renders IRAs, as they exist today, non-exemptible *de facto* because IRAs are standardized agreements, allowing for preset payment with a tax penalty imposed for withdrawal before age 59 1/2. Therefore, it may be that few, if any, IRAs meet the "on account of" requirement. In fact, one court has held that

Based on the Eighth Circuit's decision in *Huebner*, the Court concludes that the IRAs in this case are not "similar plans or contracts." In *Huebner*, the Eighth Circuit specifically held that an IRA is not a "similar plan or contract" where the debtor has unfettered discretion to withdraw from the corpus. *Huebner*, 986 F.2d 1222.

In this case, both Debtors' testimony and the language of the IRA agreements establish that Debtors may withdraw from the corpora of the IRAs at any time, subject only to a 10% excise tax penalty. The Court concludes that Debtors' IRAs are not "similar plans or contracts" within the meaning of § 522(d)(10)(E).

B. *Are the payments on account of illness, disability, death, age, or length of service?*

The Court's conclusion that the IRAs are not "similar plans or contracts" is sufficient to sustain the Trustee's objections to exemptions and grant the Trustee's motion for turnover. However, because the Court has heard evidence as to whether the right to payment under Debtors' IRAs are triggered by illness, disability, death, age or length of service, the Court will also issue findings on that issue.[6] The Eighth

---

IRAs, as they exist today, are non-exempt *per se* under § 522(d)(10)(E). *In re Zott*, 225 B.R. at 168. However, this Court finds no reason why IRAs that meet the "on account of" requirement cannot be drafted. There is nothing in the Internal Revenue Code or tax regulations to prevent a person from including a spendthrift provision in his IRA contract that takes away discretion to access the corpus of the account. *Id.* If, as the *Zott* court believed, it is "unlikely" that individuals would insist on such a provision, and if Congress determines that all IRAs should be exempt, then Congress should amend § 522 to exempt all IRAs. The Court must assiduously avoid the temptation to "fix" statutes. *In re Widdicombe*, 269 B.R. 803, 807 (Bankr.W.D.Ark.2001).

[6] Other Courts have disregarded this requirement with regard to § 408 IRAs. See *Brucher*, 243 F.3d at 244. For the reasons set forth previously in this opinion, this Court will adhere to Eighth Circuit precedent and give meaning to all of the requirements of § 522(d)(10)(E).

Circuit has held that in order for an annuity to qualify for the exemption, "the debtor may not have access to or control over the timing of the annuity payments." *Huebner*, 986 F.2d at 1225; see also *Eilbert*, 162 F.3d at 527; *Andersen*, 259 B.R. at 693. Access to and control over the timing of annuity payments mean that any payments received are not "on account of age." *Id.* The ten percent federal tax penalty imposed on early withdrawals from a § 408 IRA has been described by the Eighth Circuit as "relatively modest," and does not constitute a restriction on the right to withdraw. *Id.*

In this case, the testimony of Debtors and the language of the IRA agreements establish that Debtors may withdraw from the IRAs at any time. Therefore, Debtors' right to payment under the IRAs is not on account of illness, disability, death, age, or length of service, and Debtors right to payment under the IRAs is not entitled to an exemption under § 522(d)(10)(E).

IV. *Conclusion.*

The IRAs do not meet the first two requirements of § 522(d)(10)(E). Accordingly, Debtors are not entitled to claim exemptions pursuant to that section. The Trustee's objection to exemptions and objections to amended exemptions are hereby SUSTAINED and the Trustee's motion for turnover is hereby GRANTED, provided that Debtors are entitled to their "wildcard exemption" in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3505

RICHARD ROUSEY, ET AL.,
APPELLANTS,

v.

JILL R. JACOWAY,
APPELLEE.

ORDER DENYING PETITION FOR REHEARING
AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye, Judge Riley, Judge Melloy and Judge Smith would grant the petition for rehearing en banc.

January 9, 2004